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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ARTHUR GARLAND HESS, PETITIONER,

versus

STATE OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of South Carolina erred in not reversing the lower court and remanding for a new trial because of the trial judge's charging a statute that is void for vagueness and is therefore in violation of the Petitioner's due process rights under the Fourteenth Amendment of the United States Constitution.

2. Whether the Supreme Court of the State of South Carolina erred in not reversing the lower court and remanding for a new trial because of the lower court's denial of the Petitioner's due process rights under the Fourteenth Amendment of the United States Constitution in the following particulars:

(a) In limiting the Petitioner's cross-examination of prosecution witnesses;

(b) In limiting the presentation of defense evidence severely.

3. Whether the Supreme Court of the State of South Carolina denied the Petitioner's due process rights guaranteed under the Fourteenth Amendment of the United States Constitution by denying the Petitioner's motions for remand to the lower court for a hearing on a motion for a new trial based on after-discovered evidence without the benefit of a hearing.

4. Whether the Supreme Court of the State of South Carolina erred in admitting into evidence and allowing into the jury room a very large bulletin board (4' x 8') containing an erroneous material date contrary to the State's own evidence and a transcript of taped conversation between the Petitioner and the chief prosecution witness, all in violation of Petitioner's

right to due process under the Fourteenth Amendment of the United States Constitution.

5. Whether the Supreme Court of the State of South Carolina erred in refusing to reverse the lower court which allowed the prosecutor to attack personally the Petitioner's counsel by mentioning a past case on which the Petitioner's counsel had worked, and to refer to the Petitioner's counsel as "one who defended the owner of a brothel," all in violation of the Petitioner's Sixth Amendment rights under the United States Constitution.

6. Whether the Supreme Court of the State of South Carolina erred in refusing to reverse the lower court and remand for a new trial because of the improper jury selection method utilized in the trial, which was in violation of the Petitioner's right to an impartial jury guaranteed by

the Sixth Amendment to the United States Constitution (not excusing a person from the jury venire who had been a past employee of the South Carolina Law Enforcement Division, the police agency in charge of the investigation and prosecution of the case being tried).

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 2

Statement of Case 2

Reasons For Granting the Writ:

1. The Decision Below Conflicts with the Decision of the Supreme Court of the United States as to the Vague Statutory Languange of the South Carolina Misconduct in Office Statute 11

2. The Decision Below Conflicts with the Decisions of the Supreme Court of the United States as to Due Process of Law 16

3. The Decision Below Refusing to Remand the Case to the Trial Court for Consideration of a Motion for a New Trial on

After-discovered evidence Conflicts with the Decisions of the Supreme Court of the United States as to Due Process of Law 20

4. The Decision Below Conflicts with the Settled Authority on Demonstrative Evidence . . . 23

5. The Decision Below Conflicts with the Decision of the Supreme Court of the United States as to the Impartiality of the Jury 28

6. The Decision Below Conflicts with the Decision of the Supreme Court of the United States and the Courts Below as to the Impartiality of Jurors . . . 30

Conclusion 34

Appendix (Opinion and Judgment of Supreme Court of the state of South Carolina) 37

TABLE OF AUTHORITIES

Cases: PAGE

Armstrong v. Manzo, 85 S.Ct. 1187, 380 U.S. 545, 14 L.Ed.2d 62 (1965) 17

Carey v. Piphus, 98 S.Ct. 1042, 435 U.S. 247, 55 L.Ed.2d 252 (1978). 17,18

Chambers v. Mississippi, 93 S.Ct. 1038, 410 U.S. 284, 35 L.Ed.2d 297 (1973) 34

Goldberg v. Kelly, 90 S.Ct. 1011, 397 U.S. 254, 25 L.Ed.2d 287 (1970) 18

Grayned v. City of Rockford, 92 S.Ct. 2294, 408 U.S. 104, 33 L.Ed.2d 222 (1972) 13

Hannah v. Larche, 363 U.S. 420 (1960) 19

Hines v. Enomoto, 658 F.2d 667 (9th Cir.1981) 32

Jenkins v. McKeithen, 89 S.Ct. 1843, 395 U.S. 411, 23 L.Ed. 2d 404 (1969) 18

Lindsey v. Normet, 92 S.Ct. 862, 405 U.S. 56, 31 L.Ed.2d 36 (1972) 17

Logan v. Zimmerman Brush Co., 102 S.Ct. 1148 (1982) 17

Murphey v. Florida, 95 S.Ct. 2031, 421 U.S. 794, 44 L.Ed.2d 589 (1975) 30

Remmer v. United States, 74 S.Ct. 450, 347 U.S. 227, 98 L.Ed. 654 (1953) 21

Rose v. Locke, 96 S.Ct. 243, 423 U.S. 48, 46 L.Ed.2d 185 (1975) . . . 13

Singer v. United States, 85 S.Ct. 783, 380 U.S. 24, 13 L.Ed.2d 630 (1965) 30

Smith v. Goguen, 94 S.Ct. 1242, 415 U.S. 566, 39 L.Ed.2d 605 (1974). 14

Smith v. Phillips, 102 S.Ct. 940 (1982) 28

Swain v. Alabama, 85 S.Ct. 824, 380 U.S. 202, 13 L.Ed.2d 759, Rehearing denied, 85 S.Ct. 1528, 381 U.S.921, 14 L.Ed.2d 442 (1965) 30,31

United States v. Cox, 633 F.2d 871, cert. denied, 102 S.Ct. 159 (1980) 24

United States v. Nell, 526 F.2d 1223, (5th Cir. 1976) 31

United States v. Papia, 560 F.2d 827 (7th Cir. 1977) 25

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versus

STATE OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Arthur Garland Hess, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina entered in the above-entitled case on March 15, 1983.

OPINION BELOW

The opinion of the Supreme Court of

South Carolina is reported at State vs. Arthur Garland Hess, _____ S.C. _____, _____ S.E. 2d _____ (1983), Smith's Advance Sheets for the State of South Carolina, Opinion No. 21380, filed March 15, 1983; said opinion is printed in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of the State of South Carolina was entered on March 15, 1983. A timely petition for rehearing was denied on April 7, 1983. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C., 1257 (3).

STATEMENT OF CASE

The Petitioner Arthur Garland Hess became the Chief of Police of Columbia, South Carolina, on November 12, 1978, only after working extensively in the northern United States, mostly in Illinois and

Washington, D.C. Hess' police experience, largely in administration, included a four-and-one-half-year stint as the police chief of the Downer's Grove, Illinois, police department. The Petitioner had earned a Master of Public Administration degree in December of 1970 from the Illinois Institute of Technology.

When Hess became the police chief of the Columbia, South Carolina, police department, his naming was done in direct opposition to the wishes of the sheriff of Richland County and the solicitor (prosecutor) of the Fifth Judicial Circuit of South Carolina, which includes, among others, Richland County. Once assuming his position, Chief Hess was informed that one Joel Hendrix was a primary source of the overall criminal activity in the City of Columbia. Chief Hess had his officers

look into the situation and found that Hendrix was connected with vice, gambling, stolen property and arson in the City of Columbia. Hess then set up several undercover operations with operational level officers. Each time his efforts were thwarted because of information leaks in the Columbia Police Department. Hess noted that Joel Hendrix had close associations in the past with high-ranking officials in the Columbia Police Department, including the former chief of police and several captains.

During this time Hess reformed the Columbia Police Department, establishing new divisions to make the department more efficient and generally making his department one of the best in the State.

During Chief Hess' tenure he knew that there was an information leak in the

department which was leaking word to Hendrix of the department's undercover operations against him. However, Chief Hess could not pinpoint this leak. He expressed his concern about this to his deputy chief in the Downer's Grove Police Department, Louis Fulgaro. In December, 1978, or January, 1979, Joel Hendrix came to the Petitioner's office to offer him a bribe. Chief Hess refused this bribe. As of October, 1980, the Petitioner had not had much success in his various undercover operations against Joel Hendrix. He then attempted to establish a one-man sting operation in which he would attempt on different occasions to get Joel Hendrix to offer him a bribe by offering "stale" information on ongoing investigations into matters in which Hendrix had an interest. On the last occasion, the meeting between

the two would take place in the City of Columbia, at which time Chief Hess was going to arrest Joel Hendrix for bribery. During these meetings it was Chief Hess' testimony that he was portraying the role of a crooked cop only to attempt to get Joel Hendrix to offer him bribes. Chief Hess met with Hendrix on three different occasions. On the second occasion Hendrix gave him $1,000 at a rest stop in Calhoun County, S.C. The third and final meeting between the two took place on January 3, 1981, at a Family Mart Store in West Columbia, South Carolina. The second meeting had been audio-taped and video-taped by the South Carolina Law Enforcement Division, South Carolina's equivalent to the national Federal Bureau of Investigation. After the third meeting, at which time no money was passed between the two,

South Carolina Law Enforcement Division (otherwise known as "SLED") agents arrested the Petitioner. As it turned out, Joel Hendrix had asked for the cooperation of the State Law Enforcement Division in "attempting to catch Chief Hess accepting a bribe." On April 20, 1981, Arthur Garland Hess was indicted on two counts of obstruction of justice, two counts of misconduct in office, one count of extortion, and one count of accepting a bribe by an officer. The charges were tried at the June 22, 1981, term of the Court of General Sessions for Lexington County, South Carolina, before The Honorable Joseph R. Moss, Presiding Judge, and a jury. During the trial the trial judge severely limited the Petitioner's cross-examination of prosecution witnesses, especially that of Joel Hendrix, the chief

prosecution witness. The Petitioner was not allowed to ask Hendrix about his close association with past officials of the Columbia Police Department. Further, the Petitioner was limited severely in the presentation of defense evidence by the trial court. The trial court committed other errors in jury selection, in admission of greatly prejudicial evidence, and in charging on a statute on misconduct in office that is void for vagueness. The court also allowed the prosecutor to introduce the fact that the Petitioner's counsel represented a brothel in order to inflame the jury. At the close of all the evidence the Petitioner moved for judgment notwithstanding the verdict and in the alternative for a new trial based on all the errors as listed above. These motions were denied. The Petitioner appealed his claims to the South Carolina Supreme Court

based on all of the errors stated above and more and noted in his Brief that all were violations of either the due process rights of the Petitioner guaranteed by the Fourteenth Amendment to the United States Constitution or of the Petitioner's Sixth Amendment right to an impartial jury, also protected by the United States Constitution. The Supreme Court of the State of South Carolina affirmed the conviction on March 15, 1983, holding that the majority of the errors alleged by the Petitioner were rulings which look to the discretion of the trial court. The South Carolina Supreme Court refused to recognize the Petitioner's constitutional claims and adopted the rationale of several New Jersey cases to express its opinion of the Petitioner's action and of the Court's belief that the Petitioner had indeed engaged in misconduct in office. The

opinion of the Court appears in the Appendix of this Petition. On April 7, 1983, the Supreme Court of South Carolina denied the Petitioner's timely petition for rehearing.

REASONS FOR GRANTING WRIT

1.

The Decision Below Conflicts with the Decisions of the Supreme Court of the United States as to the Vague Statutory Language of the South Carolina Misconduct in Office Statute.

It is unclear from the record whether the Petitioner was charged with common-law or statutory misconduct in office in this case. The Petitioner contends that it is reasonable to assume that he was being tried on statutory misconduct in office. This assumption is supported by the fact that the indictment is silent as to whether the misconduct charges are common law or statutory. This assumption is further based on the fact that the solicitor states that two of the charges are common law and two of them are statutory. Since it is very clear that the extortion charge

is common law, as are the obstructions of justice, the solicitor or prosecutor was obviously including misconduct in office as one of the two statutory offenses along with acceptance of a bribe. Further, the trial judge's charge includes a definition of misconduct in office that would apply to either common-law or statutory misconduct. Further, the sentence given to the Petitioner coincides exactly with the punishment prescribed by the South Carolina Code of Laws, § 8-1-80, misconduct in office. The statute under which the Petitioner was tried and convicted is void for vagueness in that it does not inform an accused of what conduct is proscribed. The statute in question in this case, S. C. Code § 8-1-80, Code of Laws of S.C., 1976, as amended, reads as follows:

> "Any public officer whose authority is limited to a

> single election or judicial district who shall be guilty of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud or oppression shall be liable to indictment and upon conviction thereof, shall be fined not exceeding one thousand dollars and imprisoned not exceeding one year."

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Grayned vs. City of Rockford, 92 S. Ct. 2294, 408 U.S. 104, 33 L. Ed. 2d 222 (1972). This Court has held that the due process clause requires "fair warning" and that this prohibits states from holding an individual criminally responsible for conduct which he could not reasonably understand to be proscribed. Rose vs. Locke, 96 S. Ct. 243, 423 U.S. 48, 46 L. Ed. 2d 185 (1975). The Petitioner contends that the statute as quoted above covers such a variety of

actions that it would be impossible to know whether any particular conduct was proscribed. Thus, the statute does not meet the required constitutional standard and is therefore void for vagueness. Men of common intelligence should not be forced to guess at the meaning of criminal laws. Smith vs. Goguen, 94 S. Ct. 1242, 415 U.S. 566, 39 L. Ed. 2d 605 (1974). In the case at bar the Petitioner passed on certain information to Joel Hendrix that was admittedly stale (See Opinion of the Court). It is submitted that no man of common intelligence could detect from looking at S. C. Code § 8-1-80 that to pass on stale information would be in violation of its provision. A look at the Transcript shows that indeed the statutory misconduct was what the Petitioner was tried on and not the common-law misconduct. Thus, the Supreme Court of South

Carolina erred in upholding a statute so vague that it offends the due process clause of the United States Constitution.

2.

The Decision Below Conflicts with the Decisions of The Supreme Court of the United States as to Due Process of Law.

The Supreme Court of South Carolina refused in its Opinion to consider the Petitioner's due process arguments. It is submitted that the overall effect of the trial was to limit its fairness by limiting the Petitioner's cross-examination of prosecution witnesses and in limiting the presentation of defense evidence to such a point that the Petitioner was unable to present his theory of the case. First, the trial court severely limited cross-examination of the chief prosecution witness Joel Hendrix on his close association with local state law enforcement agencies and his practice of giving legal and illegal gifts to members of such agencies. The

trial court also refused to allow the Petitioner to present evidence of his character for honesty in office, since the defense theory of the case was to show that the Petitioner had an honest character in public office. The court also refused to hear several defense witnesses vital to the case. The fundamental requirement of due process is the opportunity to be heard. Armstrong vs. Manzo, 85 S. Ct. 1187, 380 U.S. 545, 14 L. Ed. 2d 62 (1965); Logan vs. Zimmerman Brush Co., 102 S. Ct. 1148 (1982). Due process requires that there be an opportunity to present every available defense. Lindsey vs. Normet, 92 S. Ct. 862, 405 U.S. 56, 31 L. Ed. 2d 36 (1972). Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty or property. Carey vs. Piphus, 98 S. Ct. 1042, 435 U.S.

247, 55 L. Ed. 2d 252 (1978). The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process. Jenkins vs. McKeithen, 89 S. Ct. 1843, 395 U.S. 411, 23 L. Ed. 2d 404 (1969); Goldberg vs. Kelly, 90 S. Ct. 1011, 397 U.S. 254, 25 L. Ed. 2d 287 (1970). The right to present evidence is essential to the fair hearing required by the due process clause, and the right becomes particularly fundamental where the proceeding results in a finding that the particular individual was guilty of the crime. Jenkins vs. McKeithen, supra. Due process is an illusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual context. Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of

factors. The nature of the alleged right involved, the nature of the proceeding and the possible burden on that proceeding are all considerations which must be taken into account. Hannah vs. Larche, 363 U.S. 420 (1960). When one examines this case as a whole, it is clear that the Petitioner very clearly was limited in his right to present his defense by the conduct of the trial court. Such a limitation is in violation of the due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

3.

The Decision Below Refusing to Remand the Case to the Trial Court for Consideration of a Motion for a New Trial on After-discovered Evidence Conflicts with the Decisions of The Supreme Court of the United States as to Due Process of Law.

On two occasions the Petitioner made motions to the South Carolina Supreme Court to remand the case on a motion for new trial on after-discovered evidence. Subsequent to the trial of the case, it was discovered that the transcript prepared by the South Carolina Law Enforcement Division of the conversation of October, 1980, between Joel Hendrix and Arthur Hess contained a major inaccuracy. Also, during the trial of the Petitioner, there was much dispute as to what happened to the $3,000 allegedly paid to Arthur

Hess by Joel Hendrix on January 3, 1981, at the Family Mart in West Columbia. This money had never been found. Subsequent to Hess' conviction in Lexington County, $3,000 was mailed in to a reporter for the Columbia State newspaper. The money was purportedly that which Joel Hendrix was supposed to have paid to Arthur Hess in some manner. The Supreme Court of South Carolina refused, upon proper motion, to remand the case to the lower court for a hearing on motions for new trial on after-discovered evidence on two separate occasions, without a hearing. These decisions are in direct conflict with the ruling of this Court in Remmer vs. United States, 74 S. Ct. 450, 347 U.S. 227, 98 L. Ed. 654 (1953), which holds that the party who files a motion for a new trial is entitled to a hearing on that motion. The Court

cannot dispose of the motion after reading the affidavits without a hearing. Although such authority was directed towards trial courts, it is clear that the same should be held for state Supreme Courts, that the principle should not differ. It is asserted that this action by the South Carolina Supreme Court violated the Petitioner's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

4.

The Decision Below Conflicts with the Settled Authority on Demonstrative Evidence.

The solicitor prepared for use at trial a large diagram (4 feet by 8 feet) on which he attempted to place the chronology of events that occurred during the State's investigation. The diagram was offered into evidence as State's Exhibit 40 and was admitted over the Petitioner's objection. After a verdict was returned, the Petitioner made a motion for a mistrial on the grounds that the diagram was improperly admitted into evidence, which motion was overruled. The diagram contained inaccurate information in that it incorporates an erroneous date critical to the prosecution's version of the facts. The date placed on the board was contrary to the evidence submitted by the State

itself and there was absolutely no evidence to support the date allowed to be placed on the exhibit. The South Carolina Supreme Court erred when it refused to reverse the lower court for admitting the diagram into evidence, rather than limiting it to use in argument only. Although no authority could be found presented by this Court, several circuit court decisions are on point. The holding of the Ninth Circuit in United States vs. Cox, 633 F.2d 871, cert. denied, 102 S. Ct. 159 (1980), is on point. The Court held that it is better to exclude illustrative evidence from the jury room since the role of such evidence is preferably that of testimonial and for the witnesses or as an aid to counsel during argument; otherwise, evidence of this sort may cause error in that it can present an unfair picture of testimony at

trial and can be a potent weapon for harm due to its great persuasiveness. It is submitted that the large board placed by the solicitor into evidence was harmful in that it surely dominated the jury room during deliberations, and in addition contained incorrect information. In addition, it is respectfully submitted that the trial court erred in placing into evidence transcripts of taped conversations between the Petitioner and the chief prosecuting witness. The circuit courts have held that such prepared transcripts prepared by the government may be used in certain specified ways, and not in others. In the case of United States vs. Papia, 560 F.2d 827 (7th Cir. 1977) the court held that it was not error to provide jurors with government-prepared transcripts of a taped conversation played at trial where the defendants were permitted to

compare the government's transcripts against the tapes and correct any discrepancies. The transcripts were not introduced into evidence and were not given to the jury for use in deliberation. Further, the jury was instructed that the transcripts were merely an aid, and that their recollection as to the contents of the tapes was controlling. Otherwise, the court held that such transcripts could have been prejudicially cumulative, as placing undue emphasis on hearsay portions of the evidence. It is submitted that the requisite safeguards as denominated by the Seventh Circuit did not appear in the present case in that undue emphasis was placed on the transcripts. Indeed, the defense was not permitted to correct any discrepancies prior to trial. The transcripts were indeed introduced into evi-

dence and were indeed given to the jury for use in deliberation. Further, no limiting instruction was given to the jury. As has been stated, in addition, the transcripts contained at least one erroneous interpretation of what had been said on a tape between the Petitioner and the chief prosecution witness. Thus, the weight of authority in the circuit courts would tend to show the Supreme Court of South Carolina committed error in refusing to reverse the lower court for the admission of two highly prejudicial pieces of evidence into the jury room during their deliberations.

5.

The Decision Below Conflicts with the Decision of the Supreme Court of the United States as to the Impartiality of the Jury.

It should be noted that the prosecutor referred to the Petitioner's counsel during the course of the trial as being defense counsel for the DeSoto Hotel, an establishment allegedly constituting a brothel in the City of Columbia, South Carolina. It should be noted that such a remark was meant solely to inflame the jury. The Petitioner objected to such a statement at the appropriate times. It should be noted that the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial. Smith vs. Phillips, 102 S. Ct. 940 (1982). Such a remark by the prosecutor was highly unfair and attempted

to cast dispersions on the Petitioner's attorney in front of the jury. It is felt that such a remark constituted reversible error, and the lower court should have granted a new trial or in the alternative, a judgment notwithstanding the verdict. It is clear that the result of this remark, combined with the other limitations placed upon the defense counsel by the trial judge, constitute an unfair trial, and that the entire matter should have been reversed by the lower court and remanded for a new trial, or in the alternative judgment notwithstanding the verdict should have been granted.

6.

The Decision Below Conflicts with the Decision of the Supreme Court of the United States and the Courts Below as to the Impartiality of Jurors.

Constitutional standards of fairness require that a state defendant have a panel of impartial, indifferent jurors. Murphey vs. Florida, 95 S. Ct. 2031, 421 U.S. 794, 44 L. Ed. 2d 589 (1975). Prospective jurors are subject to voir dire examination, to challenge for cause and to preemptory challenge. Singer vs. United States, 85 S. Ct. 783, 380 U.S. 24, 13 L. Ed. 2d 630 (1965). The right to a preemptory challenge is one of the most important of rights secured to the accused, and denial or impairment of such a right is reversible error even without showing prejudice. Swain vs. Alabama, 85 S. Ct. 824, 380 U.S. 202, 13 L. Ed. 2d 759,

Rehearing denied, 85 S. Ct. 1528, 381 U.S. 921, 14 L. Ed. 2d 442 (1965). Generally, it is error for the court to force a party to exhaust his preemptory challenges on a person who should be excused for cause. United States vs. Nell, 526 F.2d 1223 (5th Cir. 1976). If actual bias is discovered on voir dire of a prospective juror, then the court must grant the challenge for cause. Id. The Fifth Circuit case of United States vs. Nell, supra, merely takes up the challenge issued by this Court in Swain vs. Alabama, supra, in which the Court emphasized the preemptory challenge as one of the most important of rights secured to an accused. It is submitted that in the case at bar this important right was indeed violated in that a former employee of the South Carolina Law Enforcement Division was left on the jury panel, and the Petitioner was forced to

use one of his preemptory challenges to excise that juror from the jury pool. The Petitioner's Sixth Amendment right to an impartial jury was severely affected, and the South Carolina Supreme Court erred in refusing to reverse the lower court's inclusion of this member of the jury panel. Further authority for this proposition appears in the case of Hines vs. Enomoto, 658 F.2d 667 (9th Cir. 1981). The Ninth Circuit held that a criminal defendant may not be denied the full number of preemptory challenges available, and any curtailment on the exercise of the challenges is reversible error. The jury box is a holy place. The full complement of preemptory challenges is crucial. At stake is a party's right guaranteed by the Sixth Amendment to an impartial jury. In the case at bar the South Carolina Supreme

Court violated the Petitioner's Sixth Amendment right by inclusion on the jury panel of a former employee of the very agency that investigated the Petitioner and subsequently arrested him. Such a juror could not be anything but biased in her view of the Petitioner, and she should have been excused for cause.

CONCLUSION

The right of an accused in a criminal trial to due process is in essence the right to a fair opportunity to defend against the State's accusations. Chambers vs. Mississippi, 93 S. Ct. 1038, 410 U.S. 284, 35 L. Ed. 2d 297 (1973). It is clear in the case at bar that the Petitioner's due process rights under the Fourteenth Amendment of the United States Constitution, and in addition, his rights to an impartial jury under the Sixth Amendment of the United States Constitution were severely infringed upon by the Supreme Court of the State of South Carolina. The Petitioner was severely limited in the presentation of his case by the trial judge. In addition, several pieces of prejudicial evidence were admitted to the jury room during deliberations. Next, the Petitioner

was forced to excuse a clearly biased juror by the exercise of one of his preemptory challenges as opposed to having that juror excused for cause. All of these are severe violations of the Petitioner's constitutional rights.

Wherefore, the Petitioner respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the Supreme Court of South Carolina.

Respectfully submitted,

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A P P E N D I X

OPINION NO. 21322

Filed March 15, 1983

AFFIRMED

J. Marvin Mullis, Jr., of Law Offices of J. Marvin Mullis, Jr., of Columbia, for Appellant.

Attorney General T. Travis Medlock, Retired Attorney General Daniel R. McLeod and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

LEWIS, C.J.: Appellant, the former Chief of the Columbia Police Department, was found guilty on two indictments charging misconduct in office. We affirm both convictions.

In October, 1980, while serving as the Columbia Police Chief, appellant initiated a series of secret contacts with one Joel

Hendrix. The record shows that Hendrix was reputed to be a key figure both in organized criminal activities and in past corruption scandals touching local law enforcement. At trial, appellant steadfastly contended that the purpose of these contacts was to lure Hendrix into acts of bribery by offering protection and information in return for periodic payments at a rate of $1,000.00 a month. Appellant maintained that he deliberately conducted this operation as a one-man affair out of fear that Hendrix' pervasive influence within the police department might result in a compromise of the plan.

A number of facts are not disputed in the lengthy record of this trial. On October 18, 1980, appellant did accept $1,000.00 in cash from Hendrix. On October 31, 1980, appellant did accept

$1,000.00 in cash from Hendrix. On October 31, 1980, appellant did reveal to Hendrix certain police information that he as Chief of Police had received from a subordinate. On January 3, 1981, appellant again revealed to Hendrix information obtained through his office. On that date appellant also met with Hendrix to receive one of the payments described above. He was arrested at that time by agents of the State Law Enforcement Division (SLED) who, on Hendrix' information, had followed the case almost from the beginning and actually recorded most of the meetings.

The two indictments charge that on October 31, 1980, and again on January 3, 1981, appellant did "corruptly inform" Hendrix in the manner just described. While conceding all the facts recited above, appellant met the charge of mis-

conduct by a presentation of testimony designed to show that his intentions were wholesome even though his methods were unorthodox. Likewise, appellant sought to cast doubt upon the State's case by close and penetrating cross-examination of prosecution witnesses, especially Hendrix. Thus, the key issue of fact for determination by the jury was the true intent or motive behind appellant's actions.

We believe that this crucial question of fact was ably contested by both sides and brought into focus by the definition of "corruption" given in the trial court's jury instructions: "Corruption is an act done with intent to gain advantage, not consistent with official duty and rights of others. Corrupt is defined to be dishonest, without integrity, guilty of dishonesty . . . ." Reviewing the record as a

whole, we cannot conclude that a jury finding of corrupt intent would have been without evidentiary support beyond a reasonable doubt.

Appellant contends, however, that the trial was infected with numerous errors that determined its outcome. We note that most of his exceptions, and questions presented, arise from rulings which rest upon the sound discretion of the trial court. Appellant objected to the seating of a juror who had once worked for SLED and to the introduction of testimony concerning the meeting of October 19, 1980, in Calhoun County. We find no abuse of discretion in either instance and dismiss the issues as without merit.

Appellant urges that the jury was improperly allowed to take copies of tape transcripts into the jury room. It is

contended that possession of the tapes gave undue emphasis to the evidence. State v. Gulledge, ____S.C. _____, 287 S.E.2d 488; State v. Plyler, 275 S.C. 291, 270 S.E. 2d 126. We read the record otherwise. In this case there was no dispute as to the essential facts as summarized earlier. Appellant does not claim that the transcripts were inaccurate in reproducing the actual meetings between himself and Hendrix. The critical factual issue was appellant's intent and not the fact of his contacts with Hendrix. Thus, the impact of any undue emphasis on the tapes and transcripts had little effect on appellant's defense. Any error under our cases was clearly harmless.

Appellant complains that on cross-examination the State improperly elicited from him the fact that one of his trial

counsel had once represented an individual alleged to have operated a brothel which the Columbia police were seeking to close. Clearly that fact was irrelevant to the issue of appellant's guilt or innocence, but no timely objection was made to the question. The issue is not before us for review.

Appellant urges that reversible error occurred when the trial judge limited his cross-examination of Hendrix, the key witness for the State. A similar error is urged against the trial judge's limitation of witnesses whom appellant offered to demonstrate his competence, character and good reputation as a police officer. We find the rulings of the trial judge to have been soundly based on principles of relevancy and the inadmissibility of cumulative testimony. There was no abuse of discretion in these rulings.

We find, moreover, that no prejudice resulted to appellant by reason of these limitations. The record reveals that counsel for the appellant succeeded in winning acquittal under four other indictments which alleged bribery, extortion and two instances of obstruction of justice. The jury was given ample opportunity to weigh the credibility of Joel Hendrix.

With respect to appellant's other witnesses, we find no prejudice in the court's limiting character testimony as it did. It must be remembered that appellant confided in no one during the course of his single-handed operation against Hendrix. One simply cannot conceive of any direct testimony by live witnesses which could shed additional light on the question of appellant's intent during the months at issue. At best, these witnesses could have

testified that appellant was an honest man worried about corruption in the Columbia Police Department. That contention was more than once put to the jury in the record before us. The absence of further corroboration worked no prejudice.

Appellant objected to Exhibit 40 of the State which was a large display board upon which the events from October, 1980, to January, 1981, were represented for jury reference. Part of appellant's defense was his argument that the information divulged in October, 1980, was actually stale. The testimony indeed bears him out on this point. For some reason, the State's exhibit confused the sequence of events, and from this appellant concludes that the jury may have decided that he in fact compromised an ongoing investigation.

Unfortunately, this mistake was not specifically brought to the trial court's

attention. Appellant's general objection to admission of the display board contained a nebulous reference to "one or two inaccurate facts," but the specific inaccuracy complained of on appeal was never mentioned. The trial court was denied opportunity to rule on this complaint, and accordingly we deem the issue not preserved for our review.

We note, however, that there is very little likelihood of prejudice resulting from this exhibit. To bolster his own version of the October 31st disclosure, appellant submitted in evidence a calendar showing clearly that the information was stale and he so knew it to be well before his fateful disclosure to Hendrix. That calendar was marked as an exhibit, and the jury had the benefit of it in connection with evidence of the State.

In the final analysis, the relative value of the police information actually disclosed has little bearing upon the ultimate issue in this case, because we find appellant's actions to be official misconduct in any event.

Appellant correctly notes that South Carolina has no cases applying the common law of misconduct in office. Indeed this was the basis of the indictments rather than statutory offenses such as violations of Section 8-1-80, 1976 Code of Laws (general misconduct statute) or Code Section 8-13-440, (prohibition on disclosure of confidential information for financial gain).

Appellant also directs this Court to a number of well considered decisions by the New Jersey Supreme Court which form a persuasive body of law on official mis-

conduct. In good part we adopt the rationale of these leading cases.

Misconduct in office occurs when duties imposed by law have not been properly and faithfully discharged. State v. Furey, (N.J.) 318 A. 2d 783; State v. Begyn, (N.J.) 167 A.2d 161, 165, 168. The existence of a duty owed to the public is essential, for otherwise the offending behavior becomes merely the private misconduct of one who happens to be an official. State v. Weleck, (N.J.) 91 A.2d 751, 756. The jury instruction of the trial court in this case satisfactorily stated the rule as follows: "Misconduct includes any act, any omission, in breach of duty of public concern by persons in public office provided it is done wilfully and dishonestly." (Again, it should be noted, the wilful and dishonest character of appellant's conduct was the threshold fact issue

to be determined by the jury. Having found bad faith and corrupt intent, the jury could then proceed to determine whether or not the requisite elements of bribery, extortion, obstruction of justice and official misconduct had been proven under each of the separate indictments.)

New Jersey normally requires that a criminal indictment for official misconduct recite the duty that has been breached. State v. Furey, supra; State v. Begyn, supra; State v. Cohen, (N.J.) 153 A.2d 688; State v. Winne, (N.J.) 96 A.2d 63; State v. Weleck, supra. The leading case of Driscoll v. Burlington-Bristol Bridge Co., (N.J.) 86 A.2d 201, however, suggests a duty of accountability "imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office." 86 A. 2d at 222. The Court in Driscoll states this common

sense obligation as follows:

> Public officers must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly.

86 A.2d at 221.

Whatever else may be said of appellant's actions, it is clear from this record that he provided no mechanism by which the public could openly, frankly or fairly judge him or his work. It is not enough, in fulfillment of his duty, to await a criminal indictment before making a record of one's true motives. We do not deny the need for confidentiality in police investigations but rather we hold that even officials operating in secrecy must be at the same time and in some manner accountable. Appellant so designed his operation against Hendrix that not even superior

officials, whom he professed to trust, could monitor or vouch for his undertaking. A duty was owed, and the jury was entitled to conclude from the evidence that this duty was breached.

We note that the adequacy of the indictment is not attacked on this appeal. Instead appellant challenges the jury instruction of the trial court upon the narrow grounds that malfeasance, misfeasance and nonfeasance were charged together and further that the jury might have been led to convict upon a showing of mere negligence. The record decisively defeats the latter contention, for the trial court made it abundantly clear that dishonesty and corruption were required for any finding of criminal misconduct in office. The fact that three variants of misconduct were charged and also explained worked no prejudice, for the jury could

have properly condemned appellant's actions under one or all of these headings. Divulging police information for payment without adequately recording the transaction for purposes of accountability could be deemed a wrongful act in itself, hence malfeasance. The same behavior might constitute a lawful investigatory device done in a wrongful manner, hence misfeasance. With equal logic, such action could be viewed as a substantial failure to perform the duty of good faith and accountability, from which conviction for nonfeasance would flow. Appellant's exception to the jury charge clearly is without merit.

All questions being determined adversely to appellant, the convictions and judgments are hereby affirmed.

LITTLEJOHN, NESS, GREGORY and HARWELL, J.J., concur.